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SUPREME COURT, U.S.

Number 8754

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI,

Petitioner,

Vs.

WILLIAM D. COUNSELMAN, JR., ET AL.,

Respondents.

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

LEONARD W. BUCKLEY, JR.

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ST. LOUIS, MISSOURI 63101
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JOHNNY WILLIAMS

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Ohio v. Gallagher, 425 U.S. 257, 96 S.Ct. 1438, 47 L.Ed. 2d 722 (1976);

Simpson v. United States, 435 U.S. 1 (1978);

Sours v. State, 603 S.W. 2d 592 (Mo. en banc 1980);

Sours v. State, 593 S.W. 2d 208 (Mo. en banc 1980);

State v. Johnny Williams, __ S.W. 2d __;

United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 28 L.Ed. 2d 822, rehearing denied 403 U.S. 924, 91 S.Ct. 2221, 29 L.Ed. 2d 702 (1971);

Whalen v. United States, __U.S. __, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980);

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1943);

Zacchini v. Scripp-Howard Broadcasting Company, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed. 2d 965 (1977);

STATUTES CITED

Mo. Rev. Stat. Sec. 559.135

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OCTOBER TERM, 1980

STATE OF MISSOURI,

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Vs.

WILLIAM D. COUNSELMAN, JR., ET AL.,

Respondents.

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

The Respondent, JOHNNY WILLIAMS, in opposition to the granting of the Petition for Writ of Certiorari in this case, states as follows:

QUESTION PRESENTED

Whether the Writ of Certiorari should not issue because this Court lacks jurisdiction to review the decision issued by the Supreme Court of Missouri in that the ruling was based upon the authority of Sours v. State, 593 S.W. 2d 208 (Mo. banc 1980) a ruling which was based both upon federal and independent state grounds.

REASON FOR DENYING THE WRIT

THE WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE THIS COURT LACKS JURISDICITON TO REVIEW THE DECISION ISSUED BY THE SUPREME COURT OF MISSOURI IN THAT THE RULING WAS BASED UPON THE AUTHORITY OF SOURS V. STATE, SUPRA, A RULING WHICH WAS BASED BOTH UPON FEDERAL AND INDEPENDENT STATE GROUNDS.

The Supreme Court of Missouri transferred this case back to the Missouri Court of Appeals on September 23, 1980, which thereafter issued its mandate in accordance with its previously reported opinion. The appellate court held very simply that:

> The armed criminal action and the underlying felony of assault with intent to rape with malice aforethought are the same offense for double jeopardy purposes. Convictions and sentences for both constitutes prohibited multiple punishments. There was in law and fact only one crime. The elements of armed criminal action include all of the elements of assault with intent to rape. Sours v. State, No. 61458 (Mo. banc Jan. 15, 1980). The conviction and sentence for the armed criminal action, therefore, must be reversed. State v. Johnny Williams, __S.W. 2d __, (Mo. App. 1980).

Since Sours v. State, supra, and 603 S.W. 2d 592 (Mo. en banc 1980), were based upon both state and federal grounds, either of which would have been dispositive of the case, the United States Supreme Court has no jurisdiction to review the Missouri Supreme Court's decision in the case at hand. Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed. 2d 965 (1977).

Just as in Sours, supra, the instant case involves the question of whether the imposition of punishment for both armed criminal action, Section 559.135, RSMo 1969, and its underlying felony, improperly places the accused twice in jeopardy for the same act. It has been clearly established that in every such instance the question of whether there is multiple punishment is determined by what the legislature intended. Blockburger v.

United States, 284 U.S. 299, 52 S.Ct. 180 (1932); Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405 (1958); Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed. 2d 616 (1975); Simpson v. United States, 435 U.S. 1 (1978).

The Missouri Supreme Court thoroughly examined the question in Sours, supra, and determined first, as a matter of local law, the intent of its state's legislature.

The Sours court discussed the plain meaning of the language used by the legislature in drafting the armed criminal action statute, considered the requirements of Missouri's constitution regarding the construction of the statute, examined Missouri case law and investigated the form of the information or indictment used to charge armed criminal action. Sours, supra. As the court stated, 603 S.W.2d at 603:

> We have measured the legislature's intent regarding §559.225, RSMo Supp. 1976 (now §571.015, RSMo 1978) by every test and standard available to us under the law of Missouri. The conclusion is enescapable that the Missouri General Assembly did intend to impose punishment for armed criminal action "in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous (instrument) or deadly weapon." The General Assembly did clearly intend to impose two separate punishments for armed criminal action and the lesser included offense.

That construction of the armed criminal action statute is binding upon this court because the United States Supreme Court lacks jurisdiction to construe state laws. United States v. Thirty-Seven (37) Photographs, 91 S.Ct. 1400, 402 U.S. 363, 28 L.Ed. 2d 822, reh. den. 91 S.Ct. 2221, 403 U.S. 924, 29 L.Ed. 2d 702 (1971); Coleman v. Alabama, 90 S.Ct. 1999, 399 U.S. 1, 26 L.Ed. 2d 387 (1970). As was stated in Memorial Hospital v. Maricopa County, 415 U.S. 250 256, (1973), "(I)t is not our function to construe a state statute contrary to the construction given it by the highest court of a state. See also, O'Brien v. Skinner, 414 U.S. 524 (1973).

It is of no import that the Sours court went on to also

base its decision on federal constitutional grounds.

> It is undoubtedly "'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails is the non-federal ground is independent of the federal ground and adequate to support the judgment. Fox Film Corporation v. Muller, 296 U.S. 207, 210, (80 L.Ed. 158, 159, 56 S.Ct. 183)." Cramp v. Board v. Board of Public Instruction, 368 U.S. 278, 281, 7 L.Ed. 2d 285, 288, 82 S.Ct. 275.

Jankovich v. Indiana Toll Road Company, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed. 2d 439 (1965).

In Jankovich, the Indiana Supreme Court invalidated a city ordinance as authorizing an unconstitutional taking without compensation. The decision was based upon both the Indiana constitution and the United States Constitution. This Court held that the ruling was based upon adequate state grounds and therefore dismissed the writ of certiorari as improvidently granted. In the same manner, the writ of certiorari should not issue in the case at hand.

The Missouri Supreme Court based its decision on adequate, independent state grounds.

> This is not a case... where the lower court opinion as a whole "leaves the impression that the court probably felt constrained to rule as it did because of (decisions applying the 14th Amendment)," Minnesota v. National Tea Company, supra, 309 U.S. at 554-555, 84 L.Ed. at 922, or "because it felt under compulsion of federal law as enunciated by this Court so to hold," Mississippi ex rel. Southern Railroad Company v. Mayfield, 340 U.S. 1, 5, 95 L.Ed. 3, 8, 71 S.Ct. 1, with the result that the state and federal grounds are "so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law," State Tax Commissioner v. Van Catt, 306 U.S. 511, 514, 83 L.Ed. 950, 952, 59 S.Ct. 605.

Jankovich, supra, at 443.

In order to follow the established practice of avoiding constitutional decisions where possible, United States v. Simpson, 435 U.S. 6 (1978), the writ of certiorari should not issue because the lower court's decision is supported by adequate state grounds. The Supreme Court's power "is to correct wrong judgments, not to

revise opinions." Zacchini, supra, 53 L.Ed. 2d at 970.

This Court's summary dismissal of Brintley v. Michigan, ___U.S.___, 100 S. Ct. 418, 62 L.Ed. 2d 317 (1979), does not require the granting of the petition for certiorari in this case, as Petitioner suggests. An unexplicated disposition of of a lower court's decision settles the case for the parties but does not necessarily determine the validity of the lower court's reasoning as expressed in its opinion. Mandel v. Bradley, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed. 2d 199 (1977). Brintley, supra, presented the question whether separate convictions and consecutive sentences for both a felony and for felony firearm violate the Michigan and the United States constitutional prohibitions against double jeopardy. The federal constitutional issue was never reached, however, for the case was decided as a matter of Michigan's highest court construing its own statute in light of its own laws. Michigan is entitled to reach a decision different from that reached by Missouri and the principle involved in the two cases remains unchanged -- since the decisions were reached by ruling upon adequate, independent state grounds, there is no substantial federal question.

Nor is this case controlled by the fact that Sours was remanded for Missouri's reconsideration in light of this Court's decision in Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980).

> The remand of a case by the Supreme Court of the United States to a state court for reconsideration in light of an intervening decision by the Supreme Court does not amount to a final determination on the merits, but indicates that the Supreme Court found the intervening decision sufficiently decisive to compel re-examination of the case.

Henry v. Rock Hill, 376 U.S. 776, 84 S.Ct. 1042, 12 L.Ed. 2d 79 (1964).

The directive that the Missouri Supreme Court consider the reasoning in Whalen, supra, did not mandate a decision identical to the

Whalen decision.

> On remand from the Supreme Court of the United States to a state court, such court if free, so far as its own practice allows, to determine any state question involved in the case and any Federal question not already decided by the opinions of the Supreme Court.

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed 793 (1943). Upon the remand of Sours, supra, the Missouri Supreme Court chose to do just that. It decided the issues upon its own state grounds and went on to also determine the issues upon Federal law.

Similarly, in a few cases in which a state court's decision based on state substantive ground was not clearly independent of federal grounds also at issue, the Supreme Court declined to assume jurisdiction to review the judgment until the state court clarified the basis of its decision. See e.g. Minnesota v. National Tea Company, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920 (1940); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 95 S.Ct. 871, 13 L.Ed. 2d 753 (1965); California v. Krivda, 409 U.S. 1068, 93 S.Ct. 549, 34 L.Ed. 2d 520 (1972).

As a further example, in Ohio v. Gallagher, 425 U.S. 257, 96 S.Ct. 1438, 47 L.Ed. 2d 722 (1976), the Supreme Court granted certiorari to determine whether the admission in evidence of statements made by an accused in response to in-custody questioning by his parole officer violates the Miranda rule. The Supreme Court of Ohio had reversed the defendant's conviction, ruling that such evidence violated the accused's privilege against self-incrimination.

This Court ruled that it could not be certain whether the Ohio Supreme Court rested its decision upon its own state's constitution, upon the Federal constitution, or both and therefore vacated the judgment and remanded the case so that the Ohio Supreme Court could further explain. Mr. Justice Stewart wrote a separate opinion by which he dissented from the majority

and wrote that:

> It is clear to me that judgment of the Supreme Court of Ohio rests upon both the Constitution of the State of Ohio and the Constitution of the United States. That being so, the writ of certiorari must be dismissed as improvidently granted under the doctrine of Jankovich v. Toll Road Commissioner, 379 U.S. 487, 13 L.Ed. 2d 439, 85 S.Ct. 493.

Ibid. at 725.

The uncertainty involved in the Gallagher case is not present in the instant case. Upon remand, the Missouri Supreme Court clarified its position and specifically ruled that Whalen did not apply. Sours, supra. In Whalen, the issue concerned whether the imposition of cumulative punishments for rape and a killing during the course of the rape was contrary to federal statutory and constitutional law. It was a controversy involving Federal questions from its inception and did not involve local law. Sours, on the other hand, rests upon adequate state grounds. Whalen is not, therefore, determinative of this decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

Leonard W. Buckley, Jr.
1139 Olive Street, Suite 304
St. Louis, Missouri 63101
314/421-1008
Attorney for Respondent
Johnny Williams

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)
Respondents.)

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now Johnny Williams, through his attorney, Leonard W. Buckley, Jr., and moves this Court to allow him to proceed in forma pauperis and for his reasons states:

1. That there has been filed with the Supreme Court of the United States a Petition for Writ of Certiorari by the State of Missouri;

2. That Respondent is a citizen of the United States incarcerated in the Missouri Department of Corrections, Jefferson City, Missouri; and without property or money with which to pay the costs of defending an appeal and is unable to pay costs or fees on appeal as more fully appears from the affidavit attached hereto.

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Leonard W. Buckley, Jr.
Attorney for Respondent
1139 Olive Street - Suite 304
St. Louis, Missouri 63101
314/421-1008

Subscribed and sworn to before me this 10th day of December, 1980.

Maureen P. White, Notary Public

My Commission Expires:

MAUREEN P. WHITE
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 10/17/83
ST. LOUIS COUNTY

Number 8754

IN THE

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STATE OF MISSOURI,	)
	)
Petitioner,	)
	)
-vs-	)
	)
WILLIAM D. COUNSELMAN, JR., ET AL.,	)
	)
Respondents.	)

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Johnny Williams, being first duly sworn, depose and say that I am a Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are none save to defend the decision of the Court of Appeals.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No. Inmate in State Penitentiary since 1978.

2. Have you received within the past twelve (12) months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes,

automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Johnny Williams #35656
Missouri Department of Corrections
P.O. Box 900
Jefferson City, Missouri 65102

Subscribed and sworn to before me this 10th day of December, 1980.

Maureen P. White
Notary Public

My Commission Expires:
MAUREEN P. WHITE
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 10/17/83
ST. LOUIS COUNTY

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Justice, United States Supreme Court